

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

**TECHNICAL REPORT**  
**IN SUPPORT OF THE ISSUANCE OF**  
**CLEANUP AND ABATEMENT ORDER NO. R9-2003-158**

**Jeremy Haas**  
**Environmental Scientist**  
**Watershed Protection Unit**

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**TABLE OF CONTENTS**

<b><u>TOPIC</u></b>	<b><u>PAGE NO.</u></b>
<b>I. INTRODUCTION.....</b>	<b>3</b>
<b>II. BACKGROUND.....</b>	<b>3</b>
<b>III. CALIFORNIA WATER CODE SECTION 13304.....</b>	<b>4</b>
<b>IV. BASIS FOR ISSUANCE OF CAO NO. R9-2003-158.....</b>	<b>4</b>
VIOLATION OF BASIN PLAN WASTE DISCHARGE PROHIBITION NO. 1: CONDITION OF POLLUTION .....	5
VIOLATION OF BASIN PLAN WASTE DISCHARGE PROHIBITION NO. 3: UNPERMITTED FILL TO WATERS OF THE UNITED STATES.....	5
VIOLATION OF CWC §13260 AND §13376: FAILURE TO FILE REPORTS OF WASTE DISCHARGE/APPLICATION FOR SECTION 401 WATER QUALITY CERTIFICATION .....	6
VIOLATION OF CWC §13376: FAILURE TO OBTAIN COVERAGE UNDER STATEWIDE CONSTRUCTION STORM WATER PERMIT .....	6
VIOLATION OF BASIN PLAN WASTE DISCHARGE PROHIBITION NO. 8: DISCHARGES OF SEDIMENT-LADEN STORM WATER .....	7
CEQA .....	7
<b>V. BASIS FOR DIRECTIVES OF CAO NO. R9-2003-158.....</b>	<b>7</b>
NEED FOR RESTORATION EFFORT.....	7
SECTION 401 WATER QUALITY CERTIFICATION .....	8
<b>VI. CONCLUSION.....</b>	<b>9</b>

## **I. INTRODUCTION**

Cleanup and Abatement Order No. R9-2003-158 was issued April 11, 2003 to Pioneer Builders for alleged violations of the California Water Code at a residential development construction site in the City of Dana Point. The Regional Board had previously issued Notice Of Violation No. R9-2003-091 for failure to file a report of waste discharge and 401 Water Quality Certification application with the Regional Board prior the discharge of wastes/pollutants to waters of the United States/waters of the state in violation of CWC §13260 and §13376. Subsequently, Notice of Violation No. R9-2003-147 was issued to Pioneer Builders for failure to obtain coverage under the statewide Construction Storm Water Permit in violation of CWC §13376. All on-site waters of the United States/State, approximately 0.06 acres, were filled by construction activity commencing in January 2003.

## **II. BACKGROUND**

The Pioneer Builders site is an 8-unit subdivision called Castillo del Mar in the Capistrano Beach community of the City of Dana Point. It is an infill project surrounded by residential development. The site is tributary via the municipal separate storm sewer system (MS4) to the Pacific Ocean at Capistrano State Beach (Figure 1). In January 2003 the Regional Board received a complaint alleging urban runoff had contaminated soil on the site. As part of the investigation it was discovered that construction had begun and that discharges of fill material to waters of the United States/State may have been conducted without notification required by the California Water Code.

Regional Board inspectors visited the site on January 22 and January 24, 2003 to determine whether coverage under the statewide Construction Storm Water permit (SWRCB Order No. 99-08-DWQ) would be necessary and whether waters of the State may have been impacted by the discharge of fill. Concerns regarding the lack of adequate erosion and sediment control were shared with the City of Dana Point, which subsequently issued an enforcement order until BMPs were improved to the satisfaction of the City. On February 4, 2003 the U.S. Army Corps of Engineers (USACE) determined that a waters of the United States had been filled and that notification and mitigation per Clean Water Act Section 404 would be required. Because the USACE determined that a Clean Water Act Section 404 permit is required for the project, a section 401 water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions is required from the Regional Board.

Between February and April 2002, the developer and its representatives were in contact with the Regional Board regarding the mitigation requirements of the Section 401 certification and stated that on-site restoration was to be part of the mitigation required by the USACE. The USACE had indicated that a mitigation proposal for on-site and off-site mitigation with a 5:1 ratio of mitigation to impact acreage would be acceptable to the USACE. During that time, and despite repeated requests, no 401 application, site plan, or mitigation plan was provided to the Regional Board despite assurances that they would be.

At the April 9, 2003 Regional Board meeting, concerned citizens spoke during the public forum about their concerns that the project was proceeding without proper permits. At the time of the April 9, 2003 Regional Board meeting, neither a 401 application nor Notice of Intent for coverage under the statewide Construction Storm Water Permit were provided by the developer. The Board directed staff to review the case.

### **III. CALIFORNIA WATER CODE SECTION 13304**

California Water Code section 13304 states in part the following:

*(a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.*

Pursuant to CWC Section 13304, the Regional Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the Regional Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.

### **IV. BASIS FOR ISSUANCE OF CAO NO. R9-2003-158**

Pioneer Builders Inc. is the responsible person because the corporation owns the 2-acre parcel located in the County of Orange, within the municipality of Dana Point. The site is located on the north side of Camino Capistrano, between Paseo Pinzon and Calle Anejo, at 35262 and 35272 Camino Capistrano (Tentative Tract Map No. 16197). The site is located in the San Clemente Hydrologic Area (901.30) of the San Juan Hydrologic Unit (901) as described in the "Water Quality Control Plan, San Diego Basin (9)" (hereinafter Basin Plan). An unnamed creek runs through the eastern portion of the parcel. The Basin Plan has established the following designated beneficial uses for this inland surface water: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Non-contact Water Recreation (REC-2), Warm Freshwater Habitat (WARM), Wildlife Habitat (WILD), and the following potential beneficial use: Contact Water Recreation (REC-1). (In the Cleanup and Abatement Order, the location of the waters was incorrectly described as located on the southern portion of the parcel.)

Beginning in January 2003, Pioneer Builders violated Basin Plan Prohibition Nos. 1, 3, and 8 and California Water Code Sections 13260 and 13376. As a result of construction activities, the quality of water of an on-site waters of the State was polluted, and associated beneficial uses were subsequently destroyed without appropriate mitigation.

### Violation of Basin Plan Waste Discharge Prohibition No. 1: Condition of Pollution

On or before January 24, 2003, Pioneer Builders Inc. caused and/or permitted the clearing of vegetation, grading and the discharge of fill into the unnamed creek. These activities obstructed the surface flow and eliminated the ability of the creek to support water quality functions impacting beneficial uses in violation of Waste Discharge Prohibition No. 1 of the Basin Plan.

Basin Plan Waste Discharge Prohibition No. 1 states that the discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination, or nuisance as defined in California Water Code Section 13050, is prohibited. CWC §13050 defines “pollution” as an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) the waters for beneficial uses; (B) facilities which serve these beneficial uses.

Construction activities prior to and concurrent with the fill of the on-site waters, including clearing of vegetation and grading of lands adjacent to the on-site waters of the state, threatened to cause a condition of pollution by removing material that affected the quality of the on-site water and ability to support the WILD, WARM, and REC-2 beneficial uses. During site preparation activities for development of the subdivision, Pioneer Builders placed fill within the channel that resulted in the elimination of the channel and its ability to support water quality functions and beneficial uses.

### Violation of Basin Plan Waste Discharge Prohibition No. 3: Unpermitted Fill to Waters of the United States.

On or before January 24, 2003, Pioneer Builders Inc. caused and/or permitted the discharge of pollutants and/or fill to waters of the United States without authorization of an NPDES permit or a dredged or fill material permit in violation of Waste Discharge Prohibition No. 3 of the Basin Plan.

Basin Plan Waste Discharge Prohibition No. 3 states that the discharge of pollutants or dredged or fill material to waters of the United States except as authorized by an NPDES permit or a dredged or fill material permit (subject to the exemption described in CWC §13376) is prohibited. CWC §13376 effectively requires any person discharging or proposing to discharge pollutants or dredged or fill material into waters of the U.S. to file a report of waste discharge and/or apply for Section 401 water quality certification if a Federal Clean Water Act Section 404 permit is required for the activity. Waste discharge requirements may be waived by the Regional Board pursuant to waiver conditions outlined in the Basin Plan. In this case, waste discharge requirements may be waived where Department of Fish and Game (CDFG) streambed alteration agreements have been implemented.

On February 4, 2003, the U.S. Army Corps of Engineers (USACE) issued a letter of jurisdictional determination and that notified the developer that the site included jurisdictional

waters of the United States and that a Section 404 permit would be required. On February 4, 2003 the Regional Board provided application materials for Section 401 certification and a Form 200 for a Report of Waste Discharge to Pioneer Builders. On February 14, 2003 the Regional Board issued Notice of Violation No. R9-2003-091 to Pioneer Builders for failure to obtain Section 401 water quality certification. To date the CDFG has not issued a streambed alteration agreement.

**Violation of CWC §13260 and §13376: Failure to File Reports of Waste Discharge/Application for Section 401 Water Quality Certification**

As described above Pioneer Builders Inc. failed to file a report of waste discharge and 401 Water Quality Certification application with the Regional Board prior the discharge of wastes/pollutants to waters of the United States/waters of the state in violation of California Water Code Section 13376. Section 13376 states in part that any person discharging pollutants or fill material to navigable waters of the United States shall file a report of the discharge in compliance with Section 13260 requirements. Section 13260 requires that any person discharging waste that could affect the quality of waters of the state shall file a report of the discharge.

**Violation of CWC §13376: Failure to Obtain Coverage Under Statewide Construction Storm Water Permit**

Beginning on or before January 22, 2003 Pioneer Builders Inc. conducted soil disturbance activities in excess of one acre at the site without obtaining coverage under the General Permit for Storm Water Discharges Associated with Construction Activity, Order No. 99-08-DWQ in violation of California Water Code Section 13376.

CWC §13376 requires that an NPDES permit be obtained when required by Federal Law. General Permit for Storm Water Discharges Associated with Construction Activity, Order No. 99-08-DWQ is the NPDES permit associated with construction activities. The SWRCB at the December 2nd, 2002 Board Meeting adopted Modification Language to the then existing General Permit for Storm Water Discharges From Construction Activity (Board Order 99-08-DWQ) to require sites disturbing over 1 acre of soil to obtain coverage under the permit. The modified permit required that construction sites disturbing between 1 and 5 acres file a Notice of Intent prior to March 10, 2003.

The Pioneer Builders site on Camino Capistrano includes approximately 2 acres of soil disturbance. Construction began on or before January 15, 2003. On January 22, a Regional Board construction site inspector informed the on-site supervisor that coverage under the statewide construction permit was necessary. A Notice of Violation for failure to obtain coverage was issued by the Regional Board to Pioneer Builders on April 7, 2003.

**Violation of Basin Plan Waste Discharge Prohibition No. 8: Discharges of Sediment-Laden Storm Water**

At some time between January 24, 2003, and March 24, 2003, Pioneer Builders Inc. caused and/or permitted the discharge of sediment-laden storm water directly into the municipal separate storm sewer system and subsequently to downstream receiving waters in violation of Waste Discharge Prohibition No. 8 of the Basin Plan.

Basin Plan Waste Discharge Prohibition No. 8 states that any discharge to a storm water conveyance system that is not composed entirely of storm water is prohibited, except as discharged pursuant to a NPDES permit. SWRCB Board Order No. 99-08-DWQ is the pertinent NPDES permit. That permit would authorize discharges provided best management practices are implemented to a technology-based standard of Best Available Technology/Best Conventional Technology.

On February 25, 2003 the Regional Board was provided with photo-documentation from a third-party that depicted the discharge of sediment-laden water off the site and into the street, which is part of the municipal storm water conveyance system per Federal NPDES regulations (40 CFR 122.26(b)(8)). On March 15, 2003 additional photo-documentation was provided to the Regional Board that appeared to depict sediment-laden water entering the on-site MS4 inlet. On March 24, 2003, a Regional Board inspection observed evidence that appeared to show that BMPs were inadequate. Evidence of past discharges of sediment off-site included residual sediment in the adjacent street and sidewalk by the site entrance and residuals around the on-site storm drain inlet.

**CEQA**

This enforcement action is being taken for the protection of the environment and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 2100 Et seq.) in accordance with Section 15108, Chapter 3, Title 14, California Administrative Code.

**V. BASIS FOR DIRECTIVES OF CAO NO. R9-2003-158****Need for Restoration Effort**

An active restoration effort is needed to protect the unnamed creek from long-term, adverse consequences of the discharge and cleanup activities, and to restore water quality functions and beneficial uses.

The SWRCB Water Quality Enforcement Policy directs RWQCBs to comply with SWRCB Resolution No. 92-49, "Policies And Procedures for Investigation and Cleanup and Abatement of

Discharges under Water Code Section 13304”, in issuing CAOs. CAOs should require discharger(s) to clean up the pollution to background levels or the best water quality which is reasonable if background levels of water quality cannot be restored in accordance with Resolution No. 92-49. At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the RWQCB allows a containment zone.

Pre-development conditions were not directly observed by the Regional Board. A pre-development biological resources report was prepared for the site by Glenn Lukos Associates and pre-development photographs have been provided to the Regional Board by local community members. Both indicate a wetland swale of approximately 175 feet between two MS4 segments along the northeast portion of the site. Based on the biological report and the photographs, the wetland swale contained primarily non-native vegetation and southern cattail (*Typha domingensis*). Nuisance, dry-weather urban runoff was the presumed source of hydrology for the cattails. A 900-square foot patch of coyote brush (*Baccharis pilularis*), an upland species, was noted at the point where the swale emptied into the downstream stormdrain inlet. According to the biological report, portions of the swale and the coyote brush represented the only native vegetation on the 2-acre site, and no special-status animals or plants were observed. Neighbors report that a Cooper’s Hawk (*Accipiter cooperii*), which is a state species of special concern, was observed in the area. Based on the biological report and the reports of neighbors, the site likely exhibited low biochemical and habitat water quality-related functions. Beneficial uses were likely degraded prior to the impacts and included REC-2 (non-contact recreation), WARM (warm freshwater habitat) and WILD (wildlife habitat).

Filling the on-site waters with sediment and fill material has permanently destroyed the water quality functions and beneficial uses of the on-site waters. Removal of the fill material, planting of appropriate vegetation, and restoration of a water source would allow for return of limited water quality functions and beneficial uses. The site could be restored to support habitat and biochemical water quality functions related to water quality. Habitat functions could include maintenance of habitat structure, plant community, and detrital biomass, with limited habitat connectivity potential. Biochemical functions could include nutrient cycling, detention of particulates, and could provide organic carbon export to the downstream receiving water at the Pacific Ocean. Removal of fill and restoration of the structure of the on-site wetland could provide for REC-2, WARM, and WILD beneficial uses to be restored.

### Section 401 Water Quality Certification

Section 401 of the Clean Water Act requires that any person applying for a federal permit or license which may result in a discharge of pollutants into waters of the United States, must obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. Because the USACE determined that a Clean Water Act Section 404 permit is required for the project, a section 401 certification from the Regional Board is required.



Ordinarily, applications are submitted prior to the discharge of fill material into the waters of the United States/State. At that time the Regional Board evaluates the proposal and assesses the project for interim and long-term impacts to water quality, both as a result of the fill activity and the contribution of pollutants from the post-construction state. With respect to proposals to fill or modify portions of streams or wetlands, the Regional Board first assesses whether the fill is necessary for the project. If so, the Regional Board assesses whether the proposed fill or impacts are minimized to only what is necessary for the project. Once impacts are considered unavoidable, the Regional Board assesses the mitigation proposal for benefits to water quality and beneficial uses. The sequence of preference for habitat mitigation areas location is: 1) on-site; 2) off-site in the vicinity; 3) off-site in the same watershed; and 4) off-site in another watershed. The goal is to create, restore, and/or enhance a similar type of waters of the State that was impacted.

In this case, construction was commenced without a Section 401 certification and USACE Section 404 permit. The builder has stated that building proceeded without 401 and 404 permits based on the biological report conducted for the site that indicated the on-site waters would not be subject to USACE jurisdiction. By the time the Regional Board inspected the site, the waters were cleared of vegetation and had been excavated in preparation for fill. The developer was notified that a 401 certification was necessary, and a Notice of Violation was issued. Two weeks later, on February 28, 2003, the Regional Board initiated contact with the applicant's representative, Glenn Lukos Associates (GLA), to facilitate compliance. By that time, GLA, on behalf of Pioneer Builders, had made contact with the USACE, who suggested that a habitat mitigation ratio of 5:1 would be required for the Federal permit, but GLA had not contacted the Regional Board. GLA then responded on March 3 to the Regional Board that a 401 application would be forthcoming, and that it would include a combination of on-site and off-site mitigation.

Over the next few weeks, GLA indicated that they were experiencing difficulty in securing nearby off-site mitigation areas and were withholding the 401 application until a final mitigation plan could be developed. On March 19 the Regional Board notified GLA that over thirty days had passed since the Notice of Violation for lack of a 401 application. Throughout March 2003, the Regional Board continued to receive complaints that the wetlands were being filled without permits in place. On March 24 neither a 401 application nor Notice of Intent for coverage under the statewide Construction Storm Water permit had been received, and a Regional Board inspection was conducted to review the status of the project.

On April 11, 2003, fifty-six days had passed since the initial Notice of Violation was issued and no application for 401 certification, nor other site information had been received by the Regional Board from the developer. As a result, Cleanup and Abatement Order No. R9-2003-158 was issued to remove the unpermitted fill and restore the on-site waters of the State.

## **VI. CONCLUSION**

Cleanup and Abatement Order No. R9-2003-158 was issued under the authority of CWC §13304 to Pioneer Builders Inc. for violations of several Basin Plan Prohibitions and related sections of the California Water Code. The activity related to the construction of an 8-unit subdivision

resulted in the pollution of water quality and the destruction of beneficial uses of on-site waters of the United States/State. The CAO followed issuance of two Notices of Violations and requires the restoration of on-site water quality functions and beneficial uses.

**Figure 1.** Aerial photo of the location dated 1994. The Pioneer Builders site is the undeveloped parcel in the center of the photo. The Pacific Ocean is visible to the southwest of the parcel.

